A

GOVERNMENT OF MALAYSIA

v.

WONG KOK PING

B

HIGH COURT SABAH & SARAWAK, KUCHING
ABDUL AZIZ ABDUL RAHIM J
[CIVIL APPEAL NO: 12-26-2007-II]
17 JUNE 2008

C ***REVENUE LAW:*** *Income tax - Summary judgment - Claim for tax due and payable - Record of appeal - Service of notices of assessment - Whether triable issue raised - Subordinate Courts Rules 1980, O. 26A r. 1, O. 49 r. 6(3) - Income Tax Act 1967, ss. 103(4), (5A), 145(2)(c)*

D ***REVENUE LAW:*** *Income tax - Assessment - Claim for tax due and payable - Service of notices of assessment - Summary judgment - Whether triable issue raised - Subordinate Courts Rules 1980, O. 26A r. 1 - Income Tax Act 1967, ss. 103(4), (5A), 145(2)(c)*

E ***CIVIL PROCEDURE:*** *Summary judgment - Income tax - Claim for tax due and payable - Record of appeal - Service of notices of assessment - Whether triable issue raised - Subordinate Courts Rules 1980, O. 26A r. 1, O. 49 r. 6(3) - Income Tax Act 1967, ss. 103(4), (5A), 145(2)(c)*

F ***CIVIL PROCEDURE:*** *Appeal - Record of appeal - Whether defective for want of a "decision" - Summary judgment - Subordinate Courts Rules 1980, O. 26A r. 1, O. 49 r. 6(3)*

G This was an appeal by the appellant/plaintiff against the decision of the Sessions Court judge dismissing its application under O. 26A r. 1 of the Subordinate Courts Rules 1980 ('SCR') to enter summary judgment against the respondent/defendant. The plaintiff's claim against the defendant was for tax due and payable amounting to RM104,444.76 for years of assessment 1997, 1998, 1998 (additional), 1999, 1999 (additional) and 2002, inclusive of

H penalties of 10% and 5% under s. 103(4) and (5A) of the Income Tax Act 1967 ('Act'). The defendant raised a preliminary objection claiming that the Appeal Record was defective for want of compliance with O. 49 r. 6(3) of the SCR as it did not contain the "decision" of the Sessions Court judge that was appealed against. The defendant also denied that he was indebted to the

I plaintiff in the sum claimed, and further denied that he was served with notices of assessment for those assessment years.

Held (dismissing the appeal):

(1) A perusal of the Appeal Record in the instant case showed that there was a "decision" included at pp. 1 and 2 of the Record, *albeit* only a draft order of the Sessions Court judge's decision, approved by both the plaintiff's and the defendant's counsel on 5 November 2007. Nevertheless, it was a decision. Considering the amendment of O. 49 r. 6(3) of the SCR, which came into effect on 22 September 2000, and having regard to the fact that the Appeal Record in this case did contain a draft decision or order approved by counsel for both parties, it was clear that the Appeal Record was complete and in order and not defective for want of a "decision". Accordingly, there was no merit in the defendant's preliminary objection. In any case, the plaintiff had since filed a further Appeal Record to include the sealed copy of the decision/ order appealed against. *Mat Yasin Dollah v. Ibrahim Hussin & Anor* (dist); *Sii Toh Siong v. Hung Ming Chung* (not foll). (paras 7 & 12)

(2) Having regard to the decision in *Kerajaan Malaysia v. Suncity Development Sdn Bhd* and to the evidence of service of the notices of assessment in this case as found in two affidavits of service filed by the plaintiff, it was obvious that what was deposed in the two affidavits was the fact that certain notices of assessment, particulars of which were stated in the affidavits, were sent to the post office for posting in the normal course of duty of the process server who affirmed the affidavits. However, it was not stated in the two affidavits whether the notices of assessment sent to the post office were addressed to the defendant at the defendant's known or given address. There was also nothing said in the two affidavits about the deponents posting a letter containing the relevant notices of assessment addressed to the defendant at the address listed envelope(s) sent to the post office in the normal course of postal service. Therefore, adopting the reasoning and rational in *Suncity Development Sdn Bhd (supra)*, the plaintiff could not rely on the presumption in s. 145(2)(c) of the Act. That being the case, the defendant had successfully raised a triable issue as to whether the notices of assessment were indeed posted and sent to the defendant, which was crucial in light of the defendant's denial of receiving any of the

notices. On this ground alone, the appeal ought to be dismissed. *Kerajaan Malaysia v. Suncity Development Sdn Bhd* (foll). (paras 27 & 28)

Case(s) referred to:

Chew Kam Meng v. Kerajaan Malaysia [2002] 8 CLJ 151 ***(refd)***

Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Bhd [1994] 1 CLJ 328 SC ***(refd)***

Kerajaan Malaysia v. Suncity Development Sdn Bhd [2007] 1 AMR 589 ***(foll)***

Mat Yassin Dollah v. Ibrahim Hussin & Anor [1996] 4 CLJ 395 HC ***(dist)***

National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

Sii Toh Siong v. Hung Ming Chung [2000] 2 CLJ 48 HC ***(not foll)***

Legislation referred to:

Evidence Act 1950, s. 114(e)

Income Tax Act 1967, ss. 66, 99, 103(4), (5A), 145(2)(c), 146(2)

Interpretation Acts 1948 and 1967, s. 12

Rules of the High Court 1980, O. 14

Subordinate Courts Rules 1980, O. 26A r. 1, O. 29 rr. 9, 10, O. 49 rr. 3A(1)(d), 6(1), (3)(d)

For the appellant/plaintiff - Normareza Mat Rejab (Wan Khairuddin Wan Montil with her); Inland Revenue Board

For the respondent/defendant - KC Wong; M/s KC Wong Associates

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Abdul Rahim J:

[1] On 19 October 2007 the learned Sessions Court Judge dismissed the plaintiff's application under O. 26A r. 1 of the Subordinate Courts Rules 1980 ("the SCR 1980") to enter summary judgment against the defendant with costs. The plaintiff now appeals against that decision. This is the appeal.

[2] The appellant/plaintiff claimed against the respondent/defendant for tax due and payable amounting to RM104,444.76 for years of assessment 1997, 1998, 1998 (additional), 1999, 1999 (additional), 1999 (additional) and 2002 inclusive of 10% and 5% penalty under ss. 103(4) and (5A) of the Income Tax Act 1967 ("the Act").

[3] At the hearing of the appeal, counsel for the respondent/defendant raised a preliminary objection against the appeal. The objection is that the appeal record is defective for want of compliance with O. 49 r. 6(3) SCR 1980 and therefore the appeal is not properly before the court. The complaint of non compliance is that the appeal record prepared by the appellant/plaintiff counsel does not contain "the decision" of the learned Sessions Court Judge which the appellant/plaintiff had appealed against. Relating to this complaint the respondent/defendant counsel also pointed out that the appellant/plaintiff had not even applied to the court for extension of time to put in the sealed copy of the judgment of the Sessions Court as a supplementary appeal record.

[4] Before I go to the merits of the appeal, I shall depose the preliminary objection first. If the preliminary objection is upheld, then there is no need to consider the merits of the appeal and the appeal should be dismissed forthwith.

[5] As to the preliminary objection, respondent/defendant counsel submitted that the non compliance with O. 49 r. 6(3) of the SCR 1980 in the preparation of the appeal record is fatal. He cites *Mat Yassin bin Dollah v. Ibrahim Hussin & Anor* [1996] 4 CLJ 395 and *Sii Toh Siong v. Hung Ming Chung* [2000] 2 CLJ 48.

[6] Having read the two cases cited by the learned counsel for the respondent/defendant and having regard to the manner this appeal has come before this court, it is my opinion that there are no merits in the preliminary objection raised by the respondent/defendant.

[7] The case of *Mat Yassin (supra)* deals with O. 49 r. 3A(1) SCR 1980 and an appeal that came before the High Court after a full trial. Order 49 r. 3A(1) para (d) speaks of "the decision" to be part of the appeal record. If one is to follow the ruling in *Sii Toh Siong (supra)* "the decision" in that paragraph would mean "the sealed judgment", that is to say, a judgment that is drawn and entered in accordance with O. 29 rr. 9 and 10 of SCR 1980. Perusal of the appeal record in this instant case, shows that there is a "decision" included at pp. 1 and 2 of the record, *albeit* only a draft order of the learned Sessions Court Judge's decision approved by the appellant/plaintiff as well as the respondent/defendant counsels on 5 November 2007. Nevertheless it is a "decision".

[8] Though in *Mat Yassin (supra)* the court did opine, at p. 683 that "[A] draft order or an uncertified photostat copy of the order is not a decision of the court"; the court did acknowledge at the same page of the judgment that the "decision" appealed against in that case was made after a trial.

[9] That brings me to the next point which is that there is a distinction between the application of O. 49 r. 3A(1) and O. 49 r. 6(3). In my view the distinction is this: O. 49 r. 3A(1) applies only to appeal on decision made at or after a trial and O. 49 r. 6(3) applies to appeal on decision made in the course of hearing a matter other than at or after trial. This means that the decision that is appealed against pursuant to O. 49 r. 6 of the SCR 1980 is a decision arising from any application in chambers by way of an application and the hearing of which is by way of affidavit evidence. I say so because O. 49 r. 6(1) provides:

> Notwithstanding anything contained in this Order, an appeal from any decision other than a decision made after trial by the Court shall lie to a Judge in Chambers of the High Court.

[10] In this instant case the decision appealed against arose from the appellant/plaintiff's application to the learned Sessions Court judge in chambers for summary judgment under O. 26A SCR 1980. The appeal was filed to the judge in chambers. For that reason O. 49 r. 3A(1) has no application; and the case of *Mat Yassin (supra)* does not assist the respondent/defendant in this instant.

[11] The case of *Sii Toh Siong (supra)* deals with O. 49 r. 6(3) and therefore more to the point in respect of the preliminary objection in this instant case. However the judgment in that case was dated 21 January 2000. Whilst I agree that on the two authorities cited by the learned counsel for the respondent/defendant compliance with O. 49 r. 3A(1) and O. 49 r. 6(3) is mandatory, I am of the view that the decision in *Sii Toh Siong (supra)* is not applicable and has been overtaken by event. The decision in that case dealt with the construction of the old and original provision of O. 49 r. 6(3) whereby para (d) of that old provision speaks of "the decision appealed from". However since that decision, the provision of O. 49 r. 6(3) had been amended. The amendment was inserted into the Rules book *vide* P.U.(A) 343/2000 which comes into force on 22 September 2000. The

material part of the amendment that is relevant for our purpose is para (d) of the amended O. 49 r. 6(3). That paragraph now reads: "the order or draft order of the decision appealed from"; and not just simply "decision" as was discussed in *Sii Toh Siong (supra)*. For that reason I think *Sii Toh Siong (supra)* is no longer a good law to follow.

[12] Bearing the amendment of the O. 49 r. 6(3) which came into effect on 22 September 2000, and having regard to the fact the appeal record in this case did contain a draft decision or order approved by counsels for both parties, it is my opinion that the appeal record is complete and in order and not defective for want of a "decision". Accordingly therefore I find no merits in the preliminary objection by the respondent/defendant as to the appellant/plaintiff's appeal record and I therefore dismiss the preliminary objection. In any case the appellant/plaintiff has since filed in a further appeal record to include the sealed copy of the decision/order appealed against.

[13] I will now deal with the merits of the appeal.

[14] An application under O. 26A SCR 1980 is an application for summary judgment. Its equivalent is O. 14 RHC 1980. The legal principles applicable for an application under the two Rules are well settled. That is once the applicant has fulfilled the requirements of the Rules, the burden then shift to the respondent to show that there is a triable issue which warrants the case to be put to full trial and to reject the summary judgment application. Such application would only be allowed in the most plain and obvious case and there is no *bona fide* triable issues. The authorities on this point are plenty and some of them are well known land mark cases. As such is not necessary to discuss them here. However for the sake of reference I will cite the Federal Court's case of *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 and the then Supreme Court's case of *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Bhd* [1994] 1 CLJ 328.

[15] In its application and its statement of claim the appellant/plaintiff states the particulars of its claim as follows:

Year of Assessment	Notice of Assessment	Amount (RM)
1997	5-7-1999	16,218.00
1998	23-9-2000	18,138.00
1998 (Add)	7-3-2003	26,254.70
1999	23-9-2000	18,950.00
1999 (Add)	5-1-2001	598.00
1999 (Add)	7-3-2003	31,449.70
2002	26-9-2003	125.00

Defendant has failed to make payments within the time prescribed and therefore a 10% and 5% penalty is added to the claim as provided under section 103(4) and (5A) of ITA. Payments amounting to RM7,945.99 for YA 1997 and RM16,661.33 for YA 1999 had been made by the Defendant and had been duly deducted from the present claim (ref: Appendix A of Statement of Claim (pg 8 Record of Appeal ("ROA") and Affidavit In Support (pg 27 ROA)).

[16] In his written submissions dated 22 February 2008 learned counsel for the appellant/plaintiff submitted that respondent/defendant has failed to make payments of the above amounts within the time prescribed and therefore a 10% and 5% penalty is added to the claim as provided under s. 103(4) and (5A) of the Act. It was also submitted that the total amount claimed had taken into consideration the amount of RM7,945.99 and RM16,661.33 paid by the respondent/defendant for year of assessments for 1997 and 1999 respectively.

[17] It was also submitted that the notices of assessment for YA 1997 dated 5 July 1999, YA 1998 dated 23 September 2000, YA 1999 dated 23 September 2000 and YA 1999 (Additional) dated 5 January 2001 had been sent to the defendant last known address vide ordinary post; and that the respondent/defendant evidently had received the notices because the respondent/defendant had made part payments towards tax for YA 1997 and YA 1999.

[18] Counsel for the appellant/plaintiff further submitted that notices of assessment for YA 1998 (Additional) dated 7 March 3003, YA 1999 (Additional) dated 7 March 2003 and YA 2002 dated 26 September 2003 were sent by ordinary post to the

defendant last known address at Lot 75, Section 63, Jalan Padungan, 93000 Kuching. It was submitted that this address was supplied by the defendant himself in the Return Form (Form B) for YA 1998 and 1999, which are exhibited as exhs. MEMT9 and MEMT10 in the appellant/plaintiff's affidavit in reply affirmed by Mohamed Effendi bin Mohamed Tajuddin on 16 February 2007. A B

[19] The above mentioned assessment notices were exhibited as exhs. MS.1, MS.2, MS.3, MS.4, MS.5, MS.6 and MS.7 in the appellant's affidavit in support affirmed by Monica Sanyaw on 5 September 2006. In the same affidavit Monica also deposed that the defendant was notified of the amount of chargeable income, the tax charged thereon, the penalties imposed by s. 103(4) and (5) and his right of appeal under s. 99 of the Act. It was also deposed that the defendant had failed to pay the tax assessed within 30 days after the service of the notices of assessment therefore a penalty of 10% under s. 103(4) of the Act was levied; and when the defendant again failed to pay the assessed tax and the penalty of 10%, another 5% penalty on the balance unpaid was imposed in accordance with s. 103(5) of the Act. C D E

[20] As to the receipt of the service of the notices of the assessment by the defendant, counsel for the appellant/plaintiff submitted that exhs. MEMT9 and MEMT10 were sent to the defendant on 25 November 2000 and was returned by the defendant to the plaintiff on 29 June 2001. It was also submitted that the notices were sent to the correct address of the defendant because the Return Form for YA 2002, which exh. MEMT 11 in Mohamed Effendi's affidavit, was sent to the defendant at the same address and was received by the defendant as evident by the defendant returning the said Form to plaintiff on 31 May 2003. F G

[21] It was submitted that as to the evidence of posting of the notices of assessment by ordinary post, Abdul Taib bin Yakup, the Pembantu Am Rendah with Lembaga Hasil Dalam Negeri Malaysia, had deposed in his affidavit affirmed on 27 July 2007 that he did the service of notices of assessment by ordinary post for all the notices of assessment printed in Cawangan Kuching every week between 9am to 11am and in particular it was deposed that he did serve the notices of assessment for YA 1997 dated 5 July 1999 on 7 July 1999 together with other notices of assessment by ordinary post through the Pejabat Pos Kuching. H I

[22] In another affidavit of service filed by the appellant/plaintiff affirmed by Geraman ak Jilom also on 27.7.2007 it was deposed at para 6 of the affidavit that Geraman ak Jilom, another Pembantu Am Rendah of Lembaga Hasil Dalam Negeri Malaysia, had served the notices of assessment for YA 1998 dated 23 September 2000, YA 1998 (Additional) dated 7 March 2003, YA 1999 dated 23 September 2000, YA 1999 (Additional) dated 5 January 2001, YA 1999 (Additional) dated 7 March 2003 and YA 2002 dated 26 September 2003 on 25 September 2000, 9 March 2003, 25 September 2000, 8 January 2001, 9 March 2003 and 29 September 2003 respectively by sending them to the Pejabat Pos Kuching to be posted by ordinary post.

[23] Therefore it was submitted for the appellant/plaintiff that in view of the fact of service of the notices of assessment in the affidavits of service filed in support of the application, the court may invoke the presumption under s. 114(e) of the Evidence Act 1950 in that the court may presume the existence of any fact which it thinks likely to happen, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. In particular counsel for the appellant/plaintiff urge that the court may presume that judicial and official acts have regularly performed. It was submitted such approach has been adopted in two other tax cases. These are *Chew Kam Meng v. Kerajaan Malaysia* [2002] 8 CLJ 151 and the then Supreme Court's case of *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110. On these two authorities counsel for the appellant/plaintiff submitted that the service of the notices of assessment in this instant was done in the exercise of the regular duty of the plaintiff's officers namely the deponents of the affidavits of service in this case who had also deposed in their respective affidavits that one of their official duties is to serve notices of assessment by sending them to the Pejabat Pos for to be posted to the addressee by ordinary post. This duty it was submitted is an official duty albeit a routine day to day duty of the officers concerned. As such the presumption in para (e) of s. 114 of the Evidence Act 1950 applies.

[24] The respondent/defendant in his affidavit in opposition affirmed on 23 January 2007, para 3, denies that he was being indebted to the appellant/plaintiff in the sum of RM104,444.76 being income tax due for the year(s) of assessment 1997, 1998

(Additional) 1998, 1999 (Additional) 1999 and 2002. The respondent/defendant also denies in his affidavit that he was served with notices of assessment for those assessment years and he never received the notices of assessment as deposed by Monica for the appellant/plaintiff in paras 5 and 6 of her affidavit. The respondent/defendant deposed in para 6(a) of his affidavit in opposition that his residential address is at No. 601 Taman Hartawan Hui Sing 93350 Kuching, Sarawak and not at Lee Ming Press Co., P.O. Box 3068 Kuching or at Lot 75 Section 63 Jalan Padungan 93100 Kuching as alleged or claimed by the appellant/plaintiff.

[25] On this issue on non service or non receipt of service of the relevant notices of assessment counsel for the respondent submitted that the two affidavits of service of the notices in this instant case have not shown any evidence that the notices had in fact been sent to the respondent/defendant and therefore the appellant/plaintiff cannot invoke s. 145(2) of the Act as to the "deemed served" of the notices on the respondent/defendant. Counsel for respondent/defendant cited *Kerajaan Malaysia v. Suncity Development Sdn Bhd* [2007] 1 AMR 589 where in that case the defendant also alleged non receipt of the assessment notices and where the provision of s. 145(2) was also invoked by the plaintiff. The court in that case ruled that the defendant there had successfully raised the question of service of the notices of assessment as a triable issue and that before the presumption of "deemed served" under s. 146(2) of the Act can be invoked there must be at least some proof that the notice was actually posted. The court in that case further held that there should be evidence to indicate the procedure adopted by the plaintiff and perhaps a record book to indicate that on such a day a letter addressed to the defendant at the address listed on the envelope was among one of many others being posted in the ordinary course of the plaintiff's business.

[26] In *Suncity Development Sdn Bhd's case (supra)* the court considered s. 12 of the Interpretation Acts 1948 and 1967 on service of document by post and also the effect of s. 146(2) of the Act. Section 12 of the Interpretation Acts 1948 and 1967 creates two presumptions, until the contrary is proved. Firstly it is presumed that service of a document by post is effected if it is properly addressed, prepaid and posted by registered post a letter

containing the document; and secondly it is presumed that the service is to have been effected at the time when the letter would have been delivered in the ordinary course of the post. In the same case the court also bore in mind s. 66 of the Act which is almost identical with the provision of s. 12 of the Interpretation Acts 1948 and 1967.

[27] Having regard to the decision in *Suncity Development Sdn Bhd (supra)* and to the evidence of service of the notices of assessment in this instant case as found in the two affidavits of service filed by the appellant/plaintiff herein and referred to earlier in this judgment it is obvious that what was deposed in the two affidavits was the fact that certain notices of assessment, particulars of which are stated in the affidavits, were sent to the post office for posting in the normal course of duty of the process server who affirmed the affidavits. What is glaring in the two affidavits is that it does not state whether the notices of assessment that were sent to the post office were addressed to the defendant at the defendant's known address or given address. There is also nothing said in the two affidavits about the deponents posting a letter containing the relevant notices of assessment addressed to the defendant at the address listed in the envelope(s) that was or were sent to the post office for posting in the normal course of the postal service.

[28] Therefore adopting the reasoning and rational in *Suncity Development Sdn Bhd (supra)*, I think the appellant/plaintiff in this instant case cannot rely on the presumption in s. 145(2)(c) of the Act. That being the case it is my opinion that the respondent/defendant has successfully raised a triable issue as to the fact whether the notices of assessment in this case were indeed posted and sent to the respondent/defendant. This I think is crucial in the light of the defendant denying receiving any of the notices. On this ground alone I shall dismiss this appeal.

[29] Having come to the above conclusion I do not think that it is necessary for me to consider the other ground raised by the respondent/defendant in opposing this appeal that is whether the appellant/plaintiff's claim is statute barred or otherwise.

[30] Order accordingly. Costs of this appeal is awarded to the respondent/defendant. Costs to be taxed unless agreed.